St. John's Law Review

Volume 47
Number 4 *Volume 47, May 1973, Number 4*

Article 7

August 2012

CPLR 316(c): Failure to Publish Summons Within Twenty-Day Statutory Period Deemed a Jurisdicitonal Defect

St. John's Law Review

that even if the exception applied, the alleged error in this case was readily discoverable by the plaintiff or its new attorneys.[9]

Although a discovery rule for attorney malpractice would apparently not have aided the plaintiff in *Gilbert*, it would promote fairness in cases where there has been substantial delay before an attorney's malpractice could reasonably have been discovered.[10]

ARTICLE 3 — JURISDICTION AND SERVICE, APPEARANCE AND CHOICE OF COURT

CPLR 316(c): Failure to publish summons within twenty-day statutory period deemed a jurisdictional defect.

The CPLR, consistent with its policy of liberal construction,[11] permits the court to correct a mistake or irregularity at any stage of an action provided that there is no substantial prejudice to the rights of opposing parties.[12] Although courts have differentiated curable irregularities from incurable jurisdictional defects, no general standard has emerged from this classification.[13]

In *Caton v. Caton*,[14] the Supreme Court, Monroe County, addressed itself to the irregularity-jurisdictional defect dichotomy as it applied to service by publication of a summons in a divorce action. Therein, the first publication was not made within twenty days after the granting of the order of publication as required by CPLR 316(c).[15] In holding the defect to be jurisdictional and dismissing the complaint, the court distinguished mere irregularities in service by publication[16] from jurisdictional defects in the manner or time of publication.[17]

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9 40 App. Div. 2d at 104-05, 338 N.Y.S.2d at 373-74.

10 There is something profoundly distressing in the notion that a cause of action may become time-barred even before the plaintiff knew or could, as a reasonable man, have known about its existence. There may even be a due process question. 7B MCKINNEY'S CPLR 214, commentary at 437 (1972). *Cf.* Wilson v. Econom, 56 Misc. 2d 272, 288 N.Y.S.2d 381 (Sup. Ct. N.Y. County 1968). *But see* Schwartz v. Heyden Newport Chem. Corp., 12 N.Y.2d 212, 218-19, 188 N.E.2d 142, 145, 237 N.Y.S.2d 714, 719, *cert. denied*, 374 U.S. 808 (1963).

11 CPLR 104.

12 CPLR 2001.

13 Valz v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122, 134, 163 N.E. 124, 128, *cert. denied*, 278 U.S. 647 (1928).

14 72 Misc. 2d 544, 339 N.Y.S.2d 92 (Sup. Ct. Monroe County 1972).

15 Service was made by publication, but the first publication was three days late.

16 Lambert v. Lambert, 270 N.Y. 422, 1 N.E.2d 833 (1936) (failure to timely file the order of publication is curable by a *nunc pro tunc* order); Winter v. Winter, 256 N.Y. 113, 175 N.E. 533 (1931) (failure to file proof of service before judgment is an irregularity); Valz v. Sheepshead Bay Bungalow Corp., 249 N.Y. 122, 163 N.E. 124, *cert. denied*, 278 U.S. 647 (1928) (publication of summons in a newspaper different from the one named in the order of publication may be cured by amendment of order *nunc pro tunc*); Mishkind-Feinberg Realty Co. v. Sidorsky, 189 N.Y. 402, 82 N.E. 448 (1907).

17 72 Misc. 2d at 545, 339 N.Y.S.2d at 94, *citing* Doheny v. Worden, 75 App. Div. 47,

The *Caton* decision is properly strict, especially in view of the inherent weakness of service by publication in giving notice to the defendant of an impending action.[18]

ARTICLE 6 — JOINDER OF CLAIMS, CONSOLIDATION AND SEVERANCE

CPLR 602: Degree of responsibility attributable to each defendant for similar injuries suffered by a plaintiff in separate automobile accidents held to justify joint trial.

CPLR 602 bestows upon the courts broad discretionary power to join the trials of separate actions, upon motion, when they involve "a common question of law or fact."[19] *Thayer v. Collett*[20] illustrates the application of this permissive standard.[21] Therein, the Appellate Division, Third Department, held that where a plaintiff had instituted separate actions to recover for similar injuries allegedly sustained in two automobile accidents occurring a year apart, it was not an improper exercise of discretion to grant the motion of one of the defendants for a joint trial. The court found that the degree of responsibility attributable to each defendant for the alleged injuries constituted a common question of fact, and that a determination of this question by a joint trial would be fairer to both the plaintiff and the defendants since it would prevent a litigating defendant from seeking to cast blame for the injuries on the absent defendants.[22]

This decision is sound. When, as in *Thayer*, a joint trial will serve to preserve the rights of the parties, its use should be encouraged as an effective means of expediting litigation and avoiding the inconsistent verdicts that may result from a multiplicity of suits.[23]

CPLR 602: Second Department recommends trial preference when summary proceeding consolidated with action.

The CPLR appears to permit the consolidation of a plenary action with a special proceeding,[24] and a majority of New York courts have so

77 N.Y.S. 959 (4th Dep't 1902); Alfonso v. Alfonso, 99 Misc. 550, 165 N.Y.S. 1037 (Sup. Ct. Kings County 1917).

18 *See* Boddie v. Connecticut, 401 U.S. 371, 382 (1971).

19 CPLR 602(a). *See* 7B MCKINNEY'S CPLR 602, commentary at 116 (1963). *See generally* Boyea v. Lambeth, 33 App. Div. 2d 928, 306 N.Y.S.2d 481 (3d Dep't 1970) (mem.). Note that CPLR 602 liberalizes the CPA requirement for joinder, *i.e.*, that the actions grow out of the same set of facts. *Compare* CPA 96-a *and* Abbatepaolo v. Blumberg, 7 App. Div. 2d 847, 182 N.Y.S.2d 83 (2d Dep't 1959) (mem.), *with* CPLR 602(a) *and* Wyant v. Jensen, 25 App. Div. 2d 388, 270 N.Y.S.2d 156 (3d Dep't 1966).

20 41 App. Div. 2d 581, 340 N.Y.S.2d 16 (3d Dep't 1973) (mem.).

21 *See* Wyant v. Jensen, 25 App. Div. 2d 388, 270 N.Y.S.2d 156 (3d Dep't 1966); Potter v Clark, 19 App. Div. 2d 585, 240 N.Y.S.2d 495 (4th Dep't 1963) (mem.). *But see* Korn v Duhl, 22 App. Div. 2d 793, 253 N.Y.S.2d 874 (2d Dep't 1964) (mem.).

22 41 App. Div. 2d at 581, 340 N.Y.S.2d at 17.

23 *See* 2 WK&M ¶ 602.01.

24 CPLR 602(a) provides for the consolidation of "actions" involving common questions